

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

EDWARD S. O'BRIEN,	)	
Petitioner,	)	C.A. No. 02-10067-MLW
	)	
v.	)	
	)	
JOHN MARSHALL,	)	
Respondent.	)	

MEMORANDUM AND ORDER

WOLF, D.J.

August 25, 2005

The court has considered the attached Magistrate Judge's Report and Recommendation that this court dismiss Edward S. O'Brien's Petition for Writ of Habeas Corpus (the "Report"), and both petitioner's and respondent John Marshall's objections to the Report. The Report (Docket No. 27), which is hereby adopted and incorporated in this Memorandum, is persuasive for the reasons stated by the Magistrate Judge, as amplified below. The petition is, therefore, being dismissed.

Petitioner asserts three objections to the Report. First, he contends that, contrary to the conclusion of the Magistrate Judge, the exclusion of certain statements by the murder victim to her neighbor represented an unreasonable application of the law established by the Supreme Court in Chambers v. Mississippi, 410 U.S. 284, 302 (1973), and violated his federal constitutional right to due process. More specifically, the trial court excluded evidence that the victim had told a neighbor that she had evicted her brother-in-law Aristedes Ortiz from her home for drug dealing

and was in fear of him. While other evidence concerning Ortiz was admitted, these statements were excluded by the trial court as hearsay, and the Supreme Judicial Court affirmed that decision. See Commonwealth v. O'Brien, 736 N.E.2d 841, 851 (2000).

With certain exceptions, federal law, like Massachusetts law, deems hearsay to be insufficiently reliable to be admitted into evidence in a criminal trial. See Fed. R. Evid. 802. Part of the excluded evidence, the victim's statement that she feared Ortiz, might have been admissible in a federal trial pursuant to the state of mind exception to the hearsay rule. See Fed. R. Evid. 803(3); United States v. Grassi, 783 F.2d 1572, 1578 (11th Cir. 1986). However, the Federal Rules of Evidence are not coextensive with the requirements of due process. See Dickerson v. United States, 530 U.S. 428, 437 (2000); United States v. Sampson, 332 F. Supp. 2d 325, 340-41 (D. Mass. 2004).

The Supreme Judicial Court held that "[t]he judge correctly excluded the evidence [of the victim's expression of fear of Ortiz] as hearsay" under Massachusetts law. O'Brien, 736 N.E.2d at 851 (citing Commonwealth v. Mandeville, 436 N.E.2d 912 (1982)). This decision did not involve an unreasonable application of federal law.

Petitioner does not claim that the Magistrate Judge incorrectly stated the "unreasonable application" of Supreme Court precedent standard and, in any event, the court finds he did not.

See Report at 12-14. As explained in the Report, at 16-20, Chambers involved a court's refusal to permit the petitioner to cross-examine as an adverse witness a person who had confessed to the murder that the petitioner was charged with committing and its further refusal to allow the petitioner to introduce the testimony of three witnesses who had heard the confession. Chambers, 410 U.S. at 291-92. Chambers stands for the principle that a defendant has a right to call witnesses and to confront and cross-examine them. Id. at 294. In the instant case, there is no contention that Ortiz confessed to the murder, that testimony of any such confession was excluded, or that the court refused to allow any witness to be called. See Report at 19-20. Chambers 410 U.S. at 291-92, 294. Distinguishing the instant case from Chambers does not represent an unreasonable application of a clearly established Supreme Court precedent. See Hurtado v. Tucker, 245 F.3d 7, 15-16 (1st Cir. 2001), cert. denied, 122 S.Ct. 282 (2001).

Second, petitioner asserts that his Fifth Amendment right against self-incrimination was violated because the "transfer judge" who decided that he should be tried as an adult rather than as a juvenile drew adverse inferences from petitioner's unwillingness to participate in available treatment programs. Under Massachusetts law, "[a] transfer hearing is held to determine whether 'the child presents a danger to the public, and whether the child is amenable to rehabilitation within the juvenile justice

system.'" Commonwealth v. O'Brien, 673 N.E.2d 552, 556 (1996) (quoting G.L. c. 119, 61). "There is a rebuttable presumption that a juvenile charged with murder is dangerous to the public and not amenable to rehabilitation." Id. This imposes on the juvenile an initial burden of production. Id. "[T]reatment programs for pretrial detainees at the juvenile facility where [petitioner] was held are specifically designed to offer treatment while actively discouraging detainees from discussing the circumstances surrounding their pending charges. " O'Brien, 736 N.E.2d at 849.

Petitioner does not contend that the statutory scheme itself violates his Fifth Amendment right not to be compelled to incriminate himself. Rather, he asserts that in this case the transfer judge impermissibly drew adverse inferences from his silence and the Supreme Judicial Court unreasonably applied Supreme Court precedent in affirming his decision to do so.

The Supreme Judicial Court explained that:

The judge's findings were not based on the defendant's exercise of his right to remain silent, but on the defendant's failure to see any value in any treatment programs. The findings also were based on the defendant's conduct at the facility where he was held and the peer group with which he chose to associate.

Id. at 849. Petitioner contends that the foregoing indicates that the Supreme Judicial Court unreasonably applied the Supreme Court's decision in Schmerber v. California, 384 U.S. 757, 761 (1966), that the Fifth Amendment "protects an accused . . . from . . . provid[ing] the State with evidence of a testimonial or

communicative nature." However, as the Magistrate Judge noted, "the transfer judge, in determining whether the petitioner should be tried as a juvenile or as an adult, had the right to take into consideration the actions and behavior of the petitioner." Report at 24-25. Once again, the petitioner has not shown that the manner in which this was done in this case involved an unreasonable application of clearly established Supreme Court precedent. See Hurtado, 245 F.3d at 15-16.

Finally, petitioner argues that his right to substantive due process was violated when, after reversing the first transfer judge who held that petitioner should be tried as a juvenile and finding that he did not properly respond to a motion for recusal, the Supreme Judicial Court removed him from the case. See O'Brien, 736 N.E.2d at 868-9. The Magistrate Judge correctly concluded that petitioner had not shown that this decision resulted from an unreasonable application of federal law, in part because "petitioner points to no Supreme Court case standing for the proposition that removal of a judge presiding over a transfer hearing (or any hearing) violates a defendant's due process rights." Report at 27.

The Magistrate Judge, in the interest of completeness, also noted that "the [Supreme Judicial Court] did rely on an adequate and independent state ground when it denied the petitioner's appeal on the issue of the removal of the transfer judge." Id. at 28 n.7.

The respondent asserts that because the Supreme Judicial Court relied on an adequate and independent state ground, the Magistrate Judge should not have addressed the merits of petitioner's claim concerning the removal of the first transfer judge. This, and respondent's additional objection concerning the "plain statement rule," are not material to the outcome of this case. Therefore, they are not being decided.

For the reasons stated in the Report, as amplified in this Memorandum, O'Brien's Petition for Writ of Habeas Corpus (Docket No. 1) is hereby DENIED.

/s/ MARK L. WOLF  
UNITED STATES DISTRICT JUDGE

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